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IN THE

Supreme Court of the United States

October Term, 1964

No. 718

LEVIN NOCK DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, ET AL.,

Appellants,

v.

HARRISON MANN, ET AL.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria

STATEMENT OF JURISDICTION

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v.

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On Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria

STATEMENT OF JURISDICTION

I.

OPINION OF THE COURT BELOW

This appeal is taken from the Order on Mandate entered September 18, 1964, by the three-judge district court in the case of *Harrison Mann, et al.*, v. *Levin Nock Davis, et al.*, Civil Action No. 2604, United States District Court for the Eastern District, at Alexandria. The opinion upon Order on Mandate is unreported but is found as Appendix I to this statement.

II.

THE JURISDICTION OF THE COURT

1. The case below was originally brought by the appellees seeking a judgment declaring that the Virginia Apportion-

ment Acts of 1962 are unconstitutional and void. This appeal is taken from the Order on Mandate entered by the three-judge court on September 18, 1964, copy of which is attached as Appendix II to this statement. The statute pursuant to which this appeal is brought is 28 U.S.C. § 1253.

2. As stated above, the date and time of entry of the order sought to be reviewed by this appeal is September 18, 1964. The notice of appeal was filed in the United States District Court for the Eastern District of Virginia, at Alexandria, on October 2, 1964.

3. Section 1253 of Title 28, U.S.C. confers on this Court jurisdiction of this appeal and reads as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." (June 25, 1948, c. 646, 62 Stat. 926).

4. The following cases sustain the jurisdiction of this Court:

(a) *Continental Insurance Co.* v. *United States,* 259 U.S. 156 (1922);

(b) *St. John* v. *Wisconsin Employment Relations Board,* 340 U.S. 411, 414 (1951);

(c) *Palmetto Fire Insurance Co.* v. *Conn,* 272 U.S. 295, 305 (1920); and

(d) *Harrison* v. *NAACP,* 360 U.S. 167 (1959).

III.

THE QUESTION PRESENTED

Did the three-judge court below err in requiring that the terms of the present members of the Senate of Virginia be reduced from four years to two years, contrary to the provisions of the Constitution of Virginia?

IV.

STATEMENT OF THE CASE

The appellants are the Secretary of the State Board of Elections and the members thereof. The appellees are registered and qualified voters of the Commonwealth of Virginia residing, respectively, in Arlington County, Fairfax County and the City of Norfolk.

The three-judge court, in its Order on Mandate, among other things, declared and adjudged Chapters 635 and 638, Acts of Assembly of Virginia, 1962, which divide the Commonwealth of Virginia into senatorial and house districts for purposes of representation in the state legislature, to be void as denying the appellees and those similarly situated the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States.

The Order on Mandate was stayed until December 15, 1964, to afford time for the General Assembly of Virginia to enact constitutionally valid reapportionment statutes for both houses of the General Assembly[1] and to enact statutes "to effectuate said reapportionment by providing for the election of members of both houses of the General Assembly from the districts of the State as reapportioned."

It was also declared and adjudged, for reasons stated in the opinion of the court below that while the terms of the present members of the House of Delegates should not be

[1]The Governor of Virginia has called the General Assembly into Special Session to convene on November 30, 1964 for this purpose.

terminated until "the expiration of the terms for which they were elected in November, 1963, or in any special election thereafter, that is on the day before the second Wednesday of January, 1968," the terms of the present members of the Senate, who were elected in November, 1963, for terms of four years, should also terminate upon the expiration of the terms of the members of the House of Delegates, who are elected for terms of only two years.

V.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 41 of the Constitution of Virginia provides as follows:

> "The Senate shall consist of not more than forty and not less than thirty-three members, who shall be elected quadrennially by the voters of the several senatorial districts on the Tuesday succeeding the first Monday in November."

Section 24-13 of the Code of Virginia provides as follows:

> "Members of the Senate to represent each senatorial district of the State shall be elected on the Tuesday after the first Monday in November, nineteen hundred and fifty-one, and every four years thereafter, for a term of four years, to begin on the second Wednesday in January succeeding their election."

VI.

THE QUESTION PRESENTED IS SUBSTANTIAL

This appeal is directed to that part of the Order on Mandate which limits the terms of the present members of the Senate, who were elected for a term of four years in November, 1963, to the day before the second Wednesday in

January, 1966, a period of only two years, and to that part of the Order on Mandate which provides that the General Assembly of Virginia must, in effect, reduce the terms of members of the Senate by enactment of appropriate statutes not later than December 15, 1964.

Under the Order on Mandate, no further elections may be held until the General Assembly of Virginia has enacted "constitutionally valid reapportionment statutes" for both of its houses. The opinions of this Court in the redistricting cases require no more.

Yet, the court below is requiring that the terms of the present members of the Senate of Virginia be reduced from four years to two years.

As the record will show, these appellants made an application to the Chief Justice for a stay of the previous judgment of the court below entered on November 28, 1962. Such application was filed on December 11, 1962, and the answer of certain of the appellees herein, in opposition to the stay, was filed on December 12, 1962. In that answer, the appellees said:

> "Under Virginia's present election laws candidates for party nominations to the House of Delegates and Senate of the Commonwealth in the next primary election must file their declarations of candidacy on or before April 10, 1963, i.e., ninety days prior to July 9, which is the date of the primary election itself. Prospective State Senators nominated in such primary, if elected the following November, will take office in January, 1964, and serve until January, 1968. Members of the House of Delegates so nominated and elected would be in office until January, 1966. The entire General Assembly of the state is to be elected next fall. * * * "

Yet, the Chief Justice granted the appellants application for a stay on December 15, 1962.

Likewise, on or about February 12, 1963, all of the present

appellees filed with the Court motions to vacate the stay previously granted. Again, argument was made that the stay should be vacated since the election to be held in 1963 would determine representation in the Senate of Virginia until January, 1968.

Motions to vacate the stay of December 15, 1962, were not granted by this Court.

In *Davis* v. *Mann*, No. 69, October Term, 1963, decided June 15, 1964, 377 U.S. 678, 684, this Court noted:

> "With respect to relief, the Court stated that, while it would have preferred that the General Assembly itself correct the unconstitutionality of the 1962 apportionment legislation, it would not defer deciding the case until after the next regular session of the Virginia Legislature in January, 1964, because senators elected in November 1963 would hold office until 1968 and delegates elected in 1963 would serve until 1966. Deferring action would thus result in unreasonable delay in correcting the injustices in the apportionment of the Senate and the House of Delegates concluded the Court.
>
> * * *
>
> "An appeal to this Court was timely noted by defendants. On application by appellants, The Chief Justice, on December 15, 1962, granted a stay of the District Court's injunction pending final disposition of the case by this Court. Because of this stay, the November 1963 election of members of the Virginia Legislature was conducted under the existing statutory provisions. * * *"

With all of the above facts before this Court, the court below, in *Davis* v. *Mann, supra,* was directed as follows:

> " * * * After the District Court has provided the Virginia Legislature with an adequate opportunity to enact a valid plan, it can then proceed, should it become necessary, to grant relief under equitable prin-

ciples *to insure that no further elections are held under an unconstitutional scheme.* * * * " (Emphasis supplied.) (377 U.S. 693).

Also, in the companion case of *Maryland Committee* v. *Tawes,* No. 29, October Term, 1963, 377 U.S. 656, 675, this Court noted:

> "In view of the circumstances of this case, we feel it inappropriate to discuss remedial questions at the present time. Since all members of both houses of the Maryland General Assembly were elected in 1962, and since all Maryland legislators are elected to serve four-year terms, the next election of legislators in Maryland will not be conducted until 1966. Thus, sufficient time exists for the Maryland legislature to enact legislation reapportioning seats in the General Assembly prior to the 1966 primary and general elections. * * * "

It is clear that this Court has permitted the members of both houses of the Maryland legislature to remain in office until 1967. It is equally clear that it was the intention of this Court to insure only that no further elections are held in Virginia under an unconstitutional scheme. This means that the members of the House of Delegates are to be elected under constitutional apportionment legislation in 1965 and that members of the Senate are to be elected under the same constitutional apportionment legislation in 1967.

The Maryland and the Virginia situations are similar and should be so treated by the courts. In Maryland, both houses of the legislature are left undisturbed until 1967. In Virginia, the House of Delegates should be reapportioned in 1964 and elected in 1965 to take office in 1966, a year earlier than the Maryland legislature, while the Senate should be reapportioned in 1964 and elected in 1967 pursuant to such valid reapportionment to take office in 1968, a year later than the Maryland legislature. The Maryland legislature

meets every year in regular session while the General Assembly of Virginia meets in regular session once in two years. This regular session is held on the second Wednesday in January next succeeding the election of the members of the House of Delegates. See, § 46 of the Constitution of Virginia.[2] The next regular session will be held in 1966. See, § 24-11 of the Code of Virginia.[3]

The legislature of Maryland is permitted to hold regular sessions in 1965 and in 1966, this being the same legislature that has now been declared to have been elected pursuant to unconstitutional apportionment statutes.[4] Yet, the three-judge court below refuses to permit the present members of the Senate of Virginia to meet in one regular session in 1966 to which they were duly elected.

It is submitted that this Court did not intend for two sister states to be treated in such different fashion, and that the three-judge court below has misconstrued the directions of this Court.

It must be remembered that the members of the Senate of Virginia are *de jure* officers since, at the time of the Senate elections in 1963, the order of the three-judge court, declaring the apportionment statutes unconstitutional, had been stayed by the Chief Justice. Yet, to repeat, the court below is requiring that the term of a senator be reduced from four to two years. This has been done even though the validity of § 41 of the Constitution of Virginia, providing for a four-year term of office, was not challenged by the appellees and, indeed, was recognized by them as controlling and valid. This Court did not intend that the three-judge court below

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[2]The provisions of § 46 of the Constitution of Virginia are found as Appendix III of this Statement.

[3]The provisions of § 24-11 of the Code of Virginia are found as Appendix IV of this Statement.

[4]See Order on Mandate in *Maryland Committee* v. *Tawes,* a copy of which is found as Appendix V of this Statement.

should disregard state constitutional provisions. Indeed, in *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Court said that courts should attempt to shape relief within the framework of state constitutional provisions. The three-judge court has erred in its failure to do this.

The appellants are aware of no other federal district court in the land which has ordered a state legislature to reduce the terms of its already elected members contrary to state constitutional provisions and statutes enacted pursuant thereto. This raises a serious and unprecedented question of law which should be passed upon by this Court.

VII.

CONCLUSION

Appellants submit that the substantial federal question presented by this appeal should be accorded plenary consideration by this Court, with briefs on the merits and oral argument.

Respectfully submitted,

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PROOF OF SERVICE

I, HENRY T. WICKHAM, one of the attorneys for the appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of November, 1964, I served copies of the foregoing Statement of Jurisdiction on the several appellees hereto by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows:

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APPENDIX I

Opinion Upon Order On Mandate

Albert V. Bryan, Circuit Judge:

A foremost concern in framing the order on the mandate of the Supreme Court affirming our original decree is the question of the maximum period in which the present, 1963, General Assembly elected under the condemned statute may still function and with what powers. In our opinion it must expire as to both houses not later than the 2nd Wednesday in January 1966.

We think the 1963 Assembly necessarily is empowered to enact the requisite reapportionment laws. There is no other body to do so, and unless its jurisdiction is recognized for this purpose the State would be helpless to accomplish the reapportionment. The Supreme Court has tacitly approved this accordance of provisional vitality to the existing legislature. Maryland Committee v. Tawes, 377 U.S. 656, 675 (1964); Reynolds v. Sims, 377 U.S. 533, 585 (1964) adopting the view expressed by Justice Douglas concurring in Baker v. Carr, 369, U.S. 186, 250 footnote 5.

We think, also, that after the 1963 Assembly has enacted a constitutionally valid reapportionment statute—but not before then—and during the interval between its adoption and the commencement of the terms of the Senators and Delegates chosen in the 1965 elections, *vide post*, the Assembly should not be restrained from considering and passing such legislation as it considers necessary or proper in the public interest. If the present legislature could not act in this interim, a potentially dangerous interregnum could result, for there would be no legislature available in an emergency. Moreover, if this authority were not conceded, special elections for the creation of a new General Assembly would have to be called immediately after the passage of the reapportionment statute. This would mean an election of Delegates

to serve for a matter of months, when a primary election of Delegates is probable in July and a regular general election is set for November, 1965. That would be an undue burden upon the State elective processes. In these exigencies general principles of equity, as noted by the Supreme Court in the decisions just cited, sustain an order permitting such a temporary continuance of the powers of the current legislature.

In the effort to minimize disruption of the State's elective processes as far as possible, but still consistently with our first order, it is well to recall those processes and consider their application here. When our finding of invalidity in the legislative apportionment was made in November 1962, both houses of the General Assembly were to stand for election the following year, 1963. During the temporary stay of enforcement of this finding, the 1963 election proceeded upon the unconstitutional apportionment. Delegates were then chosen for 2-year terms expiring on the 2nd Wednesday in January 1966, and the Senators were selected for 4 years each, that is until the 2nd Wednesday in January 1968.

Orderly procedure would, therefore, suggest that the 1963 House of Delegates should continue in being until the expiration of their terms in January 1966. *Cf.* Reynolds v. Sims, *supra*, 377 U. S. 533, 585 (June 15, 1964). In the November 1965 general election a House of Delegates will, under the Virginia law, be elected to assume their duties on the 2nd Wednesday in January 1966. Of course, the 1965 House would be serving under the new apportionment.

As noted, however, the 1963 Senate would not normally leave office until January 1968. Elected on a void pattern of representation, there is no warrantable foundation for its accreditation beyond January 1966. Further, if it should be allowed to survive until 1968, the General Assembly—from January 1966 to January 1968—would be composed of a

House of Delegates elected on one (a valid) scheme of apportionment with a Senate elected upon another (invalidated) plan. This too, would be constitutionally unjustifiable. Together the two houses in a bicameral system form a unitary and entire legislature. For equality of popular representation they are mutually complementary, and constitutional validity is not fulfilled if one house is deliberately permitted to lag behind the other in seeking fairness of representation. *Cf.* Maryland Committee v. Tawes, *supra*, 377 U.S. 656, 673

Incidentally, practical difficulties might develop if the life of the 1963 Senate lasted until 1968. In the event of vacancies in the Senate, as an illustration, they could not be filled because no elections may be conducted under the nullified apportionment statutes. Reynolds v. Sims, *supra*, 377 U. S. 533, 585. Probably none could be held under the new act because of the subsequent rearrangement of the district. While such eventualities might occur in the House of Delegates also, the opportunity there for such contingencies is for one year only—1965.

For these reasons we hold that the terms of the 1963 elected Senators as well as Delegates must come to an end not later than January 1966. Unavoidably, this will mean a special election of Senators to serve from January 1966 to January 1968. However, to repeat, we have stated only the maximum limits of the life of the present legislature. We do not mean to say that special elections may not be called earlier than November 1965, if the legislature desires, so that a General Assembly under the new reapportionment statute might be constituted before January 1966.

United States Circuit Judge

September 18, 1964.

APPENDIX II

Order On Mandate

This action came on to be heard upon the mandate of the Supreme Court of the United States affirming the judgment order of this Court entered November 28, 1962, upon the motions of the plaintiffs and intervening plaintiffs for an order on said mandate and the argument of counsel; upon a consideration of all of which it is

DECLARED, ADJUDGED AND ORDERED:

1. That the Governor of Virginia and the Attorney General be dismissed as parties defendant to this action;

2. That the motion of the defendants to dismiss the complaint and intervening petition be denied;

3. That the acts of the General Assembly of Virginia, approved April 7, 1962, appearing as Chapter 635, page 1266, and Chapter 638, page 1269 of the 1962 Acts of the Assembly of Virginia, deny the plaintiffs and plaintiff-interveners and those persons similarly situated the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States, and that the said acts for that reason are void and of no effect;

4. That the order entered by this court on November 28, 1962 be in all respects reaffirmed but the enforcement of said order be further stayed until December 15, 1964 insofar as necessary to afford ample time for the General Assembly of Virginia to be called and convened in special session, if the Governor or the requisite number of members of the General Assembly are so advised, for the purpose of enacting constitutionally valid reapportionment statutes for both houses of the General Assembly, and enact statutes to effectuate said

reapportionment by providing for the election of members of both houses of the General Assembly from the districts of the State as reapportioned;

5. That, for the reasons set forth in the opinion filed this day, the terms of the present members of the House of Delegates shall not be terminated by force of the said order before, but shall terminate upon, the expiration of the terms for which they were elected in November, 1963 or in any special election thereafter, that is on the day before the second Wednesday of January, 1966;

6. That, for the reasons set forth in said opinion, the terms of the present members of the Senate, who were elected in November 1963 or in any special election thereafter, shall not be terminated by force of the said order before, but shall terminate upon, the expiration of the terms of the members of the House of Delegates elected in November, 1963 or thereafter as aforesaid, that is the day before the second Wednesday in January, 1966;

7. That the motion of the plaintiffs and plaintiff-interveners that the present General Assembly be enjoined at this time from enacting any legislation other than the said reapportionment statutes be denied; but by way of a declaratory judgment the court now states that after the enactment of a constitutionally valid reapportionment statute the present General Assembly may until the 2nd Wednesday in January 1966 consider and pass such legislation as it deems necessary or proper in the public interest, unless before that date through special elections a General Assembly is chosen in conformity with the new reapportionment statute.

8. That the motion of the defendants for a continuance is also denied, in view of the stay herein granted of the ef-

fectiveness of the order issued by this Court on November 28, 1962;

9. That the plaintiffs and plaintiff-interveners recover of the defendants their statutory costs, assessed or assessable in the Supreme Court and in this court, and that the motion of the plaintiff-interveners for an allowance of counsel fees as a part of said costs is denied; and

10. That if the steps stated in paragraph 4 hereof for reapportionment be not taken before December 15, 1964, or if taken they do not meet the requirements of a constitutionally valid reapportionment, then the plaintiffs, the plaintiff-interveners and any part hereafter granted leave to intervene, may apply to the court for such further orders as may be required; and jurisdiction of this action is hereby retained for entry of such other orders as may be necessary or proper.

.....

United States Circuit Judge

.....

United States District Judge

.....

United States District Judge

September 18, 1964.

APPENDIX III

§ 46, Constitution of Virginia

§ 46. *Time and duration of meetings of General Assembly; adjournments; majority shall be a quorum; power of smaller number than a quorum.*—The General Assembly shall meet once in two years on the second Wednesday in January next

succeeding the election of the members of the House of Delegates and not oftener unless convened in the manner prescribed by this Constitution. No session of the General Assembly shall continue longer than sixty days; but with the concurrence of three-fifths of the members elected to each house, the session may be extended for a period not exceeding thirty days. Members shall be allowed a salary for not exceeding sixty days at any regular session, and for not exceeding thirty days at any extra session. Neither house shall, without the consent of the other, adjourn to another place nor for more than three days. A majority of the members elected to each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and shall have power to compel the attendance of members in such manner and under such penalty as each house may prescribe.

APPENDIX IV

§ 24-11, Code of Virginia, 1950

§ 24-11. *When members of the House of Delegates elected; term of office.*—The members of the House of Delegates shall be elected on the Tuesday succeeding the first Monday in November, nineteen hundred and forty-nine, and biennially thereafter on the Tuesday succeeding the first Monday in November for a term of two years to begin on the second Wednesday in January succeeding their election.

APPENDIX V

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL.
Plaintiffs-Appellants,

v.

J. MILLARD TAWES, Governor, ET AL.,
Defendants-Appellees

In the Court of Appeals of Maryland
No. 140, September Term, 1962

ORDER

This cause coming on for hearing upon the motion of the appellants for a clarifying order on remand from the Supreme Court of the United States, and it appearing to the court that no clarification is necessary or advisable at this stage of the proceedings, it is thereupon this 23rd day of September, 1964, by the Court of Appeals of Maryland,

ORDERED: that the case be and it is hereby remanded to the Circuit Court for Anne Arundel County with directions to retain jurisdiction and to take affirmative action upon the application of any of the parties to this cause, if the Maryland Legislature should fail to enact a constitutionally valid State legislative apportionment scheme prior to the 1966 primary elections in compliance with the decision of the Supreme Court in the case at bar. Costs to be paid by the appellees.

William L. Henderson
Chief Judge

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MOTION OF APPELLEES, INTERVENING PETITIONERS BELOW, CHARLES L. GLANVILLE, WILLIAM L. SHEPHEARD, PAUL M. LIPKIN AND JACK R. WILKINS, TO DISMISS THE APPEAL OR AFFIRM THE THREE JUDGE FEDERAL COURT OPINION

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Appellees, intervening petitioners below, Charles L. Glanville, William L. Shepheard, Paul M. Lipkin and Jack R. Wilkins, move to dismiss the subject appeal or affirm the opinion of the three judge Federal Court below on the grounds that the question presented is so unsubstantial as to not need further argument and the opinion below is patently correct.

I.

STATEMENT OF THE CASE

Appellees adopt the jurisdictional statement and postulation of the question contained in appellant's statement of jurisdiction. However, the following statement of the case is submitted:

On November 28, 1962, the Three Judge District Court, with one Judge dissenting, ruled that Virginia's statutes apportioning seats in the Virginia Legislature, as amended in 1962 were unconstitutional, null and void. [1]

At their peril, state officials held elections in 1963 based upon statutes that had been judicially declared void and of no effect.

This Court, on June 15, 1964, [2] affirmed the judgment of the District Court on the merits and remanded the case for further proceedings.

On September 18, 1964, in a unanimous opinion the Court held that since both houses had been elected at a time when a vital part of the election statutes had been declared unconstitutional, the members of both the House of Delegates and the Senate would have to stand for re-election in 1965 to take office in January 1966. (Appellant's Appendix 1)

The Court gave the General Assembly until December 15, 1964, to reapportion itself pursuant to its Order On Mandate. (Appellant's Appendix 4)

The Virginia General Assembly was convened by the Governor on November 30, 1964, and on December 1, the Assembly approved bills reapportion-

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[1] Mann, et al v. Davis, 213 F. Supp. 577
[2] Davis, et al v. Mann, 374 U.S. 803, 84 S.Ct. 1453

ing the House of Representatives and the Senate. (See House Bill 1, Appellees' Appendix 1; Senate Bill 1, Appellees' Appendix 6)

On December 4, the House and Senate concurred in Senate Bill 6, (Appellees' Appendix 9) which provides that if this Court rules on the appeal by March 15, 1965, the Governor, at his discretion, may call for a special election for Senators pursuant to the provisions made and provided for primaries and general elections on the same dates that Virginia will elect members of the House of Delegates, Governor, Lieutenant Governor and Attorney General, as well as other state officers.

If the opinion of this court is handed down after March 15 it will be too late to qualify for primaries and the Governor will select the most practical date for holding a single election for Senators.

II.

ARGUMENT

A

The District Court Opinion Is Correct and Should Be Affirmed

The Virginia General Assembly, unlike the Maryland Assembly, was elected in the face of a decision that held that the districts from whence the members of the Senate and House of Delegates were elected were malapportioned, unconstitutional, null and void.

The body of law and the opinion of this Court hold that an unconstitutional act confers no rights,

imposes no duties and creates no office.[3]

The only way the Senate of Virginia may purge itself of its taint of illegality as created by an election held pursuant to a judicially condemned apportionment statute, is to be re-elected pursuant to a constitutional apportionment statute.[4]

In addition the Court predicted a practical difficulty that would arise in the event of death, where the vacancy in the Senate could not be filled because no election could be conducted under the nullified apportionment statutes.[5]

B

No Substantial Question Exists

This Court on June 15, 1964, handed down five opinions involving constitutional questions pertain-

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[3]Norton v. Shelby Co. (1886) 118 U.S. 178, 6 S. Ct. 1121.
See also:
Coyne v. State (1926) 22 Ohio App. 462, 153 N.E. 876
State v. Gillette (1928) Tex. Com. App. 10 S.W. 2d 984
State ex rel Coe v. Harrison (1927) 217 Ala. 80, 114 So. 905
Johnston v. Dunworth (1907) 127 Mo. App. 377, 105 S.W. 1055
Commonwealth v. Fugate (1830) 2 Leigh 724

[4]District Court Opinion (Appellant's Appendix 2)

"As noted, however, the 1963 Senate would not normally leave office until January 1968. Elected on a void pattern of representation, there is no warrantable foundation for its accreditation beyond January 1966. Further, if it should be allowed to survive until 1968, the General Assembly — from January 1966 to January 1968—would be composed of a House of Delegates elected on one (a valid) scheme of apportionment with a Senate elected upon another (invalidated) plan. This too, would be constitutionally unjustifiable. Together the two houses in a bicameral system form a unitary and entire legislature. For equality of popular representation they are mutually complementary, and constitutional validity is not fulfilled if one house is deliberately permitted to lag behind the other in seeking fairness of representation. Cf. Maryland Committee v. Tawes, supra, 377 U.S. 656, 673)"

[5]State Senator Charles Moses died November 17, 1964, representing the 11th Senatorial District.

ing to state representation.[6] Having decided the constitutional questions involved, the implementation of the opinions was left to lower courts to administer.

Where an equitable decree has been rendered by the lower court on mandate, a review would only serve to delay the effective and orderly implementation of the constitutional principles contained in the opinions of this Court.

This Court announced the principle in the instant case, the District Court has implemented the same and the Legislative body involved has provided for orderly election processes, which will be assisted by a dismissal of this appeal or an affirmance of the District Court's opinion as soon as practicable prior to March 15, 1965.

III.

CONCLUSION

Appellees submit that no substantial federal question is presented by this appeal, the District

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[6] Davis, et al y. Mann, 374 U.S. 803, 84 S. Ct. 1453
Lucas, et al v. Forty-Fourth General Assembly of Colorado, 375 U.S. 938, 84 S. Ct. 1472

Maryland Committee for Fair Representation, et al v. Tawes, 374 U.S. 804, 84 S. Ct. 1442

WMCA, Inc., et al y. Lomenzo, et al, 370 U.S. 190, 84 S. Ct. 1418
Reynolds, et al v. Sims, et al, 374 U.S. 802, 84. S. Ct. 1362.

Court opinion is patently correct and should be affirmed.

Respectfully submitted,

CHARLES L. GLANVILLE, WILLIAM L. SHEPHEARD, PAUL M. LIPKIN AND JACK R. WILKINS,

HENRY E. HOWELL, JR.
LEONARD B. SACHS
SIDNEY H. KELSEY

Attorneys for Appellees

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808 Maritime Tower
Norfolk, Virginia

PROOF OF SERVICE

I, Henry E. Howell, Jr., one of the attorneys for the appellees herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of December, 1964, I served copies of the foregoing Motion Of Appellees To Dismiss The Appeal Or Affirm The Three Judge Federal Court Opinion on the several appellants hereto by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows:

Robert Y. Button, Esquire
State Supreme Court—Library Building
Richmond, Virginia

R. D. McIlwaine, III, Esquire
State Supreme Court—Library Building
Richmond, Virginia

David J. Mays, Esquire
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Richmond, Virginia

Henry T. Wickham, Esquire
1407 State Planters Bank Building
Richmond, Virginia

HENRY E. HOWELL, JR.,
Attorney for Appellees.

HOUSE BILL NO. 1

CHAPTER

An Act to amend and reenact § 24-12, as amended, of the Code of Virginia, relating to apportionment of the members of the House of Delegates.

[H 1]

Approved

Be it enacted by the General Assembly of Virginia:

1. That § 24-12, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 24-12. Members of the House of Delegates shall be distributed and apportioned, and each county, city and combination is entitled to representation in the House of Delegates by a delegate, or by delegates, as follows:

**First.—Chesapeake, two.*

Second.—Accomack and Northampton, one.

Third.—Albemarle and Greene, one.

Fourth.—Charlottesville, one.

Fifth.—Alexandria, two.

Sixth.—Alleghany, *Botetourt*, Covington and Clifton Forge, one.

Seventh.—Amelia, * *Lunenburg* and Nottoway, one.

Eighth.—Amherst and Lynchburg, one.

Ninth.—Arlington, * *four.*

Tenth.—Augusta, Highland, Staunton and Waynesboro, two.

Eleventh.—Bedford, one.

Twelfth.—Bland, * *Craig*, Giles, *Pulaski and Wythe*, * *two.*

**Thirteenth.—Danville and Pittsylvania*, one.

Fourteenth.—Brunswick and * *Dinwiddie*, one.

Fifteenth.—Buchanan, one.

Sixteenth.—Russell and Dickenson, one.

**Seventeenth. — Roanoke City and Roanoke County*, one.

Eighteenth.—Campbell, one.

Nineteenth—Caroline, King George, Essex and King and Queen, one.

**Twentieth.—Fairfax County, and the cities of Alexandria, Fairfax and Falls Church*, one.

Twenty-first.—* James City, * York and Williamsburg, one.

Twenty-second. — Charlotte, *Cumberland* and Prince Edward, one.

Twenty-third. — Chesterfield and Colonial Heights, * *two.*

Twenty-fourth. — Clarke, Frederick and Winchester, one.

Twenty-fifth.—Danville, one.

Twenty-sixth.—Hampton, * *two.*

Twenty-seventh.—Fairfax *County*, and cities of Fairfax and Falls Church, * *six.*

Twenty-eighth.—Fauquier, *Warren* and Rappahannock, one.

Twenty-ninth.—Fluvanna, Goochland, * Louisa *and Powhatan*, one.

Thirtieth.—Franklin *County and Floyd*, one.

Thirty-first.—Gloucester, Mathews, *New Kent, Charles City* and Middlesex, one.

Thirty-second. — *Carroll*, Grayson and Galax, one.

Thirty-third.—Greensville, *Surry* and Sussex, one.

Thirty-fourth.—Halifax and South Boston, one.

Thirty-fifth.—Hanover and King William, one.

Thirty-sixth. Henrico, * *and city of Richmond, eight.*

Thirty-seventh.—Henry, Patrick and Martinsville, two.

Thirty-eighth.—Isle of Wight, * *Southampton* and * *city of Franklin*, one.

Thirty-ninth. — Northumberland, Westmoreland, Lancaster and Richmond County, one.

Fortieth.—Newport News, three.

Forty-first.—Lee, Wise, and city of Norton, two.

Forty-second.—Loudoun *and Prince William*, * *two.*

Forty-third.—Lynchburg, one.

Forty-fourth.—Madison, Culpeper and Orange, one.

Forty-fifth.—Mecklenburg, one.

Forty-sixth.—Montgomery and Radford, one.

Forty-seventh.—Nansemond and Suffolk, one.

Forty-eighth. — Nelson *, *Appomattox and Buckingham*, one.

**Forty-ninth.*—Norfolk City, * *seven.*

**Fiftieth.*—Page *, *Rockingham, Shenandoah and Harrisonburg*, one.

**Fifty-first.*—Petersburg *, *one.*

**Fifty-second.*—Pittsylvania, * *one.*

**Fifty-third.*—Portsmouth, * *three.*

**Fifty-fourth.*—Prince George * and Hopewell, one.

**Fifty-fifth.*—* Virginia Beach, two.

**Fifty-sixth.*—Roanoke County, one.

**Fifty-seventh.*—Roanoke City, two.

**Fifty-eighth.* — Rockbridge, Bath and Buena Vista, one.

**Fifty-ninth.*—Rockingham and Harrisonburg, * *one.*

**Sixtieth.*—Smyth, one.

**Sixty-first.* — Spotsylvania, Stafford and Fredericksburg, one.

**Sixty-second.*—Tazewell, one.

**Sixty-third.*—Washington, Scott and Bristol, two.

And the districts hereby created are hereby

numbered one (1) to * *sixty-three* (*63*) inclusive.

The reference to a county or city in this section is to the area comprising such county or city as of January one, nineteen hundred sixty-five. 2. If any part or parts, section, subsection, sentence, clause or phrase of this act or the application thereof to any person or circumstance is for any reason declared unconstitutional, such decisions shall not affect the validity of the remaining portions of this act which shall remain in force as if such act had been passed with the unconstitutional part or parts, section, subsection, sentence, clause, phrase or such application thereof eliminated; and the General Assembly hereby declares that it would have passed this act if such unconstitutional part or parts, section, subsection, sentence, clause or phrase had not been included herein, or if such application had not been made.

SENATE BILL NO. 1

CHAPTER

An Act to amend and reenact § 24-14, as amended, of the Code of Virginia, relating to State senatorial districts.

[S 1]

Approved

Be it enacted by the General Assembly of Virginia:

1. That § 24-14, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 24-14. The State is hereby divided into * *thirty-three* districts entitled to senators as follows:

First.—The counties of Accomack, Northampton, * *Mathews, Gloucester and York*, one.

Second.—Norfolk city, * *three.*

Third.—* *The cities of Chesapeake, Portsmouth and Virginia Beach, three.*

Fourth.—The counties of Halifax, Charlotte, * Prince Edward, *Lunenburg and Nottoway* and the city of South Boston, one.

Fifth.—The counties of Isle of Wight, Nansemond, Southampton and the cities of Suffolk and Franklin, one.

Sixth. — The counties of Greensville, *James City*, Prince George, Surry and Sussex, and the * *cities* of Hopewell *and Williamsburg*, one.

Seventh.—The counties of Brunswick, * *Din-*

widdie and Mecklenburg, *and the city of Petersburg*, one.

Eighth.—The counties of * *Arlington and Fairfax, and the cities of Fairfax and Falls Church*, one.

Ninth.—Arlington county, one.

**Tenth.*—The counties of Appomattox, Buckingham, * Amherst, Nelson and * *Campbell*, one.

**Eleventh.* — * *Bedford* County and city of Lynchburg, one.

**Twelfth.*—The counties of Henry, Patrick and Pittsylvania and the cities of Danville and Martinsville, two.

**Thirteenth.*—The counties of * Carroll, Floyd, * *Franklin and Montgomery*, and the **cities* of Galax *and Radford*, one.

**Fourteenth.*—The counties of Washington, Lee and Scott and the city of Bristol, one.

**Fifteenth.*—The counties of Dickenson, *Russell* and Wise and the city of Norton, one.

**Sixteenth.* — The counties of Buchanan, * *Smyth* and Tazewell, one.

**Seventeenth.*—The counties of Bland, Giles, Pulaski, *Craig*, *Grayson* and Wythe, one.

**Eighteenth.* — The counties of Alleghany, * *Bath*, Botetourt, * and * *Roanoke*, and the cities of * Clifton Forge and Covington, one.

**Nineteenth.* — The counties of Augusta, * *Rockbridge* and Highland, and the cities of *Buena Vista*, Staunton and Waynesboro, one.

*Twentieth.—The counties of Page, Rappahannock, Rockingham and Warren, and the city of Harrisonburg, one.

*Twenty-first.—The counties of Clarke, Frederick, Shenandoah *and Loudoun* and the city of Winchester, one.

*Twenty-second.—The counties of Albemarle, Fluvanna, Greene, *Cumberland, Powhatan* and Madison, and the city of Charlottesville, one.

*Twenty-third. — The counties of Goochland, Louisa, Orange, *Spotsylvania, *Culpeper, Caroline, King George* and the city of Fredericksburg, one.

*Twenty-fourth.—The county of Fairfax and the cities of Fairfax and Falls Church, two.

*Twenty-fifth.—The counties of * Prince William, * Stafford and *Fauquier*, one.

*Twenty-sixth. — The counties of * Hanover, King William, Essex, King and Queen, Middlesex, *Westmoreland, Northumberland, Richmond and Lancaster*, one.

*Twenty-seventh.—City of Newport News *, one.

*Twenty-eighth.—City of Hampton, one.

*Twenty-ninth.—The counties of Charles City, Chesterfield, * *Amelia* and New Kent and the * *city* of Colonial Heights *, one.

*Thirtieth.—Richmond city, two.

*Thirty-first.—County of Henrico, one.

*Thirty-second.—City of Roanoke, one.

*Thirty-third.—City of Alexandria, one.

SENATE BILL NO. 6

CHAPTER

An Act to amend the Code of Virginia by adding a section numbered 24-13.1 to provide for the election in nineteen hundred sixty-five of members of the Senate of Virginia for terms expiring in January nineteen hundred sixty-eight; and to provide how members of the Senate of Virginia shall be elected for terms commencing in January nineteen hundred sixty-eight and thereafter.

[S 6]

Approved

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia be amended by adding a section numbered 24-13.1 as follows:

§ 24-13.1 (a) Notwithstanding the provisions of § 24-13 of this Code, if the Attorney General of Virginia shall file with the Clerk of the Virginia State Senate a copy of an order of the Supreme Court of the United States, or other federal court, finally adjudicating that the terms of the incumbent members of the Senate of the General Assembly of Virginia terminate on or before the convening in January, nineteen hundred sixty-six, of the regular session of the General Assembly, the Governor shall issue a writ calling a special election to elect the several members of the State Senate. The writ shall set forth the date of the election. All other provisions of law relating to the conduct of special elections

shall apply. At such special election, the candidates for election to the several State Senatorial Districts, as such Districts are then legally constituted, receiving the highest number of votes, respectively, shall be declared elected, and shall, upon qualifying for office, constitute the Senate of the General Assembly. Provided, however, if the Attorney General of Virginia shall file the copy of the order hereinabove-mentioned with the Clerk of the Virginia State Senate on or before the fifteenth day of March, nineteen hundred sixty-five, the Governor, in his discretion, is authorized to issue the writ calling an election to elect the several members of the State Senate on the date of the general election in November, nineteen hundred sixty-five. In such event, except as herein modified, all other provisions of law providing for primaries or conventions to nominate persons as candidates, and for the election of members of the State Senate, shall apply. The persons so elected and qualifying shall hold office for a term of two years commencing on the second Wednesday in January succeeding their election and ending upon the convening in January, nineteen hundred sixty-eight, of the regular session of the General Assembly.

(b) Successors to the members of the State Senate elected for terms expiring in January, nineteen hundred sixty-eight, shall be elected in November, nineteen hundred sixty-seven, pursuant to the provisions of § 24-13 of the Code.

(c) This act shall expire as of January ten, nineteen hundred sixty-eight.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 718

LEVIN NOCK DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, ET AL, *Appellants*,

v.

HARRISON MANN, ET AL, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA

MOTION OF APPELLEES MANN, STONE, WEBB AND DONOVAN TO DISMISS OR AFFIRM

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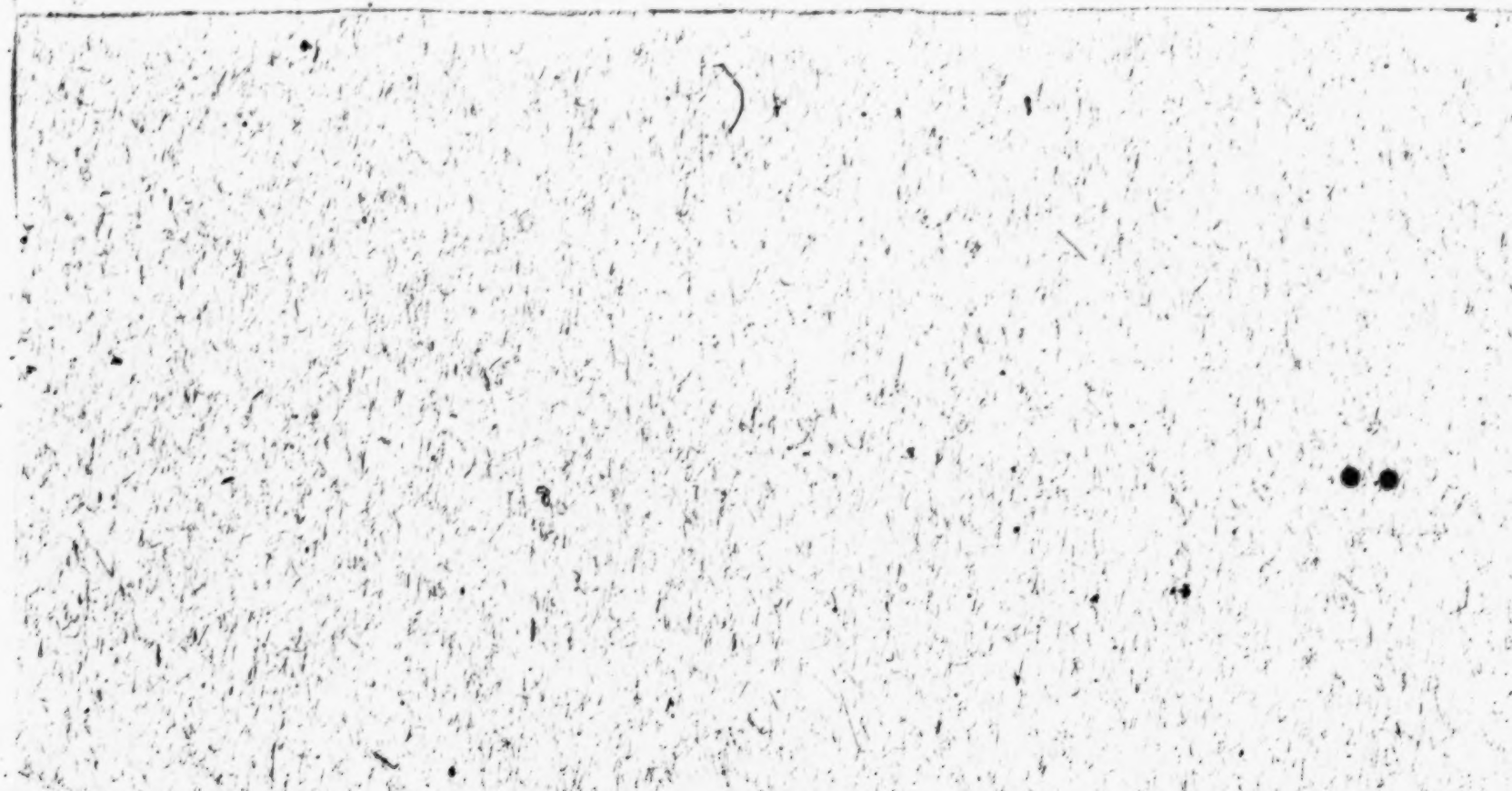

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MOTION OF APPELLEES MANN, STONE, WEBB AND DONOVAN TO DISMISS OR AFFIRM

Appellees Harrison Mann, Kathryn Stone, John C. Webb and John A. K. Donovan move the Court to dismiss this appeal on the ground that the order complained of was not one granting or denying an interlocutory or permanent injunction and therefore is not appealable to this Court under 62 Stat. 926, 28 USC 1253.

The said appellees also move, in the alternative, to affirm on the ground that the question presented by this appeal is so unsubstantial as not to need further argument.

Statement

This appeal is the second one in this case. It seeks to challenge portions of an order entered on September 18, 1964, by a District Court of three judges upon the mandate of this Court in *Davis* v. *Mann*, 377 U.S. 678.

The facts involved and the proceedings had prior to this Court's decision just cited, are fully set forth in this Court's opinion in that case. In its decision this Court affirmed an interlocutory injunction order entered by the District Court on November 28, 1962, which had declared Virginia's legislative apportionment statutes violative of the Fourteenth Amendment to the Federal Constitution and which enjoined any further elections thereunder (*Davis* v. *Mann*, 377 U.S. 678, 693).

Because of a stay of the District Court's original injunction, granted by the Chief Justice during the pendency of the first appeal, the November 1963 election of members of both houses of the Virginia legislature was actually held under the statutes which this Court subsequently declared unconstitutional; and the new legislature has been acting *de facto* ever since its members thus elected assumed their seats in January 1964. If the election had been a constitutionally valid one, the members of the House of Delegates thus chosen would continue in office until the second Wednesday in January 1966 while state Senators would continue in office until January 1968.

In affirming the District Court's original injunction order this Court said:

> "We find it unnecessary and inappropriate to discuss questions relating to remedies at the present time. Since the next election of Virginia lgislators will not occur until 1965, ample time remains for the Virginia Legislature to enact a constitutionally valid reappor-

tionment scheme for purposes of that election. After the District Court has provided the Virginia Legislature with an adequate opportunity to enact a valid plan, it can then proceed, should it become necessary, to grant relief under equitable principles to insure that no further elections are held under an unconstitutional scheme. Since the District Court stated that it was retaining jurisdiction and that plaintiffs could seek further appropriate relief, the court below presumably intends to take further action should the Virginia Legislature fail to act promptly in remedying the constitutional defects in the State's legislative apportionment plan. We therefore affirm the judgment of the District Court on the merits of this litigation, and remand the case for further proceedings consistent with the views stated here and in our opinion in *Reynolds* v. *Sims*." *Davis* v. *Mann*, 377 U.S. at 692-693.

On September 18, 1964 the District Court entered its order on the mandate of this Court (Jurisdictional Statement, App. 4). In that order the District Court (a) reaffirmed its original injunction order of November 28, 1962, which had declared unconstitutional the Virginia statutes under which the 1963 election had been held; (b) gave "provisional vitality" to the legislature chosen under the "condemned statute" by declaring that such legislature could enact constitutionally valid reapportionment statutes and then transact ordinary business until after the election scheduled to be held in November 1965; (c) again stayed the effective date of the court's original injunction until December 15, 1964, to give time for the legislature to enact new reapportionment statutes; and (d) stayed (in effect) the application of the injunction to state senators elected

under the condemned statute until the second Wednesday in January, 1966.

Appellants by their appeal have asserted that the District Court's order required "that the terms of the present members of the Senate of Virginia be reduced from four years to two years, contrary to the provisions of the Constitution of Virginia" (Statement of Jurisdiction p. 3).

Appellants, on October 16, 1964, applied to the Chief Justice for a stay of said order pending this appeal. On October 28, 1964, the Chief Justice denied the application.

On December 2, 1964, at a special session called by the Governor of Viginia the *de facto* General Assembly enacted amended reapportionment statutes for the distribution and apportionment of members of the House of Delegates and of the Senate of the state. Copies of these amended statutes (Va. Code Sec. 24-12 and Sec. 24-14) which were approved December 2, 1964, are set forth in the appendix hereto.[1]

At the same special session, the General Assembly enacted a new statute (Sec. 24-13.1) making provision for a special election of state senators in the event of a final court adjudication that the terms of the present [*de facto*] state senators are to terminate in January, 1966. A copy of this statute is also set forth in the appendix hereto.

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[1] The new reapportionment statutes give to appellees and to all other voters in Arlington and Fairfax Counties and the city of Falls Church (in which appellees reside) substantially proportionate representation in the General Assembly of Virginia computed on the 1960 census of population.

ARGUMENT

I

Appellants have noted their appeal to this Court under the statute authorizing appeals from an order of a District Court of three judges granting or denying an injunction (62 Stat. 926, 28 USC 1253).

But the District Court's "Order on Mandate" here complained of did not grant or deny an injunction. The order insofar as pertinent to this appeal simply (a) reaffirmed an existing injunction already held valid by this Court in *Davis* v. *Mann*, 377 U.S. 678; and (b) granted an additional *stay* of the effectiveness of said injunction, insofar as it affected invalidly elected state senators, until the second Wednesday in January, 1966. There was no new injunction granted or denied by the District Court, and it is submitted that this appeal was improvidently taken. Unless therefore this Court should elect to consider on its own motion whether its mandate in *Davis* v. *Mann*, 377 U.S. 678, has been complied with,[2] it is submitted that the appeal should be dismissed for want of jurisdiction.

II

Appellees also urge that the District Court's "Order on Mandate" was clearly correct, and that it should be affirmed by this Court without further argument.

This Court in its original opinion in this case, 377 U.S. 678, 693, authorized the District Court "to grant relief under equitable principles to insure that no further elections are held under an unconstitutional scheme." And as the District Court pointed out in its opinion accom-

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[2] See *Continental Insurance Co.* v. *U.S.*, 259 U.S. 156, 166.

panying the order on mandate, there could be no constitutional validity to the scheduled election in 1965 of the Virginia House of Delegates if the state Senate "is deliberately permitted to lag behind * * * in seeking fairness of representation." The District Court also pointed out that with respect to "equality of popular representation they [the two houses] are mutually complementary." See Opinion of District Court, Statement of Jurisdiction, App. 1-3. C.f. also *Maryland Committee* v. *Tawes*, 377 U.S. 656, 673.

The District Court's "Order on Mandate" clearly recognizes the "equitable principles" which this Court has said should guide its actions. As was indicated by Judge Bryan in his opinion accompanying the order, the state government will be subject to less confusion if the new reapportionment statutes are made effective as to both houses of the legislature at the same time than would be the case if they were made effective at different times. The order does not make any "unreasonable or embarrassing demands on [the] state in adjusting to the court's decree." c.f. *Reynolds* v. *Sims*, 377 U.S. 533, 585. In fact the General Assembly of Virginia has already made the necessary adjustments since the entry of the District Court's order by enacting new reapportionment statutes and by making tentative provision for the necessary special election of state senators in 1965.

The Chief Justice has already declined to stay the District Court's order pending this appeal. If the District Court's order is promptly affirmed, procedures for the 1965 primary and general election of state Senators in the newly constituted districts can become operative immediately without the uncertainties which would be inherent in the delays that would normally result if this case is put on the calendar for argument.

For the foregoing reasons it is respectfully submitted that this appeal should be dismissed, or in the alternative, that the order and judgment of the District Court should be affirmed.

EDMUND D. CAMPBELL,
822 Southern Building,
Washington, D.C. 20005,

E. A. PRICHARD,
106 N. Payne Street,
Fairfax, Virginia,
Attorneys for Appellees Mann, Stone, Webb and Donovan.

An Act to amend and reenact § 24-12, as amended, of the Code of Virginia, relating to apportionment of the members of the House of Delegates.

Approved December 2, 1964

Be it enacted by the General Assembly of Virginia:

1. That § 24-12, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 24-12. Members of the House of Delegates shall be distributed and apportioned, and each county, city and combination is entitled to representation in the House of Delegates by a delegate, or by delegates, as follows:

*First.—*Chesapeake, two.*

Second.—Accomack and Northampton, one.

Third.—Albemarle and Greene, one.

Fourth.—Charlottesville, one.

Fifth.—Alexandria, two.

Sixth.—Alleghany, *Botetourt*, Covington and Clifton Forge, one.

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Eighth.—Amherst and Lynchburg, one.

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Tenth.—Augusta, Highland, Staunton and Waynesboro, two.

Eleventh.—Bedford, one.

Twelfth.—Bland, *Craig*, Giles, *Pulaski and Wythe*, *two.*

Thirteenth.—Danville and Pittsylvania, one.

Fourteenth.—Brunswick and *Dinwiddie*, one.

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Twentieth.—Fairfax County, and the cities of Alexandria, Fairfax and Falls Church, one.

Twenty-first.—*James City, *York and Williamsburg, one.

Twenty-second.—Charlotte, *Cumberland* and Prince Edward, one.

Twenty-third.—Chesterfield and Colonial Heights, **two.*

Twenty-fourth.—Clarke, Frederick and Winchester, one.

Twenty-fifth.—Danville, one.

Twenty-sixth.—Hampton, **two.*

Twenty-seventh.—Fairfax *County* and cities of Fairfax and Falls Church, **six.*

Twenty-eighth.—Fauquier, *Warren* and Rappahannock, one.

Twenty-ninth.—Fluvanna, Goochland, *Louisa *and Powhatan*, one.

Thirtieth.—Franklin *County and Floyd*, one.

Thirty-first.—Gloucester, Mathews, *New Kent, Charles City* and Middlesex, one.

Thirty-second.—*Carroll*, Grayson and Galax, one.

Thirty-third.—Greensville, *Surry* and Sussex, one.

Thirty-fourth.—Halifax and South Boston, one.

Thirty-fifth.—Hanover and King William, one.

Thirty-sixth.—Henrico, **and city of Richmond, eight*

Thirty-seventh.—Henry, Patrick and Martinsville, two.

Thirty-eighth.—Isle of Wight, **Southampton* and **city of Franklin*, one.

Thirty-ninth.—Northumberland, Westmoreland, Lancaster and Richmond County, one.

Fortieth.—Newport News, three.

Forty-first.—Lee, Wise, and city of Norton, two.

Forty-second.—Loudoun *and Prince William*, **two.*

Forty-third.—Lynchburg, one.

Forty-fourth.—Madison, Culpeper and Orange, one.

Forty-fifth.—Mecklenburg, one.

Forty-sixth.—Montgomery and Radford, one.

Forty-seventh.—Nansemond and Suffolk, one.

Forty-eighth.—Nelson*, *Appomattox and Buckingham*, one.

**Forty-ninth.—Norfolk City, *seven.*

**Fiftieth.*—Page*, *Rockingham, Shenandoah and Harrisonburg*, one.

***Fifty-first.—Petersburg*, one.**
***Fifty-second.—Pittsylvania, *one.**
***Fifty-third.—Portsmouth, *three.**
***Fifty-fourth.—Prince George* and Hopewell, one.**
***Fifty-fifth.—*Virginia Beach, two.**
***Fifty-sixth.—Roanoke County, one.**
***Fifty-seventh.—Roanoke City, two.**
***Fifty-eighth.—Rockbridge, Bath and Buena Vista, one.**
***Fifty-ninth.—Rockingham and Harrisonburg, *one.**
***Sixtieth.—Smyth, one.**
***Sixty-first.—Spotsylvania, Stafford and Fredericksburg, one.**
***Sixty-second.—Tazewell, one.**
***Sixty-third.—Washington, Scott and Bristol, two.**

And the districts hereby created are hereby numbered one (1) to ***sixty-three (63)** inclusive.

The reference to a county or city in this section is to the area comprising such county or city as of January one, nineteen hundred sixty-five.

2. If any part or parts, section, subsection, sentence, clause or phrase of this act or the application thereof to any person or circumstance is for any reason declared unconstitutional, such decisions shall not affect the validity of the remaining portions of this act which shall remain in force as if such act had been passed with the unconstitutional part or parts, section, subsection, sentence, clause, phrase or such application thereof eliminated; and the General Assembly hereby declares that it would have passed this act if such unconstitutional part or parts, section, subsection, sentence, clause or phrase had not been included herein, or if such application had not been made.

An Act to amend the Code of Virginia by adding a section numbered 24-13.1 to provide for the election in nineteen hundred sixty-five of members of the Senate of Virginia for terms expiring in January nineteen hundred sixty-eight; and to provide how members of the Senate of Virginia shall be elected for terms commencing in January nineteen hundred sixty-eight and thereafter.

Approved December 12, 1964

Be it enacted by the General Assembly of Virginia:

That the Code of Virginia be amended by adding a section numbered 24-13.1 as follows:

§ 24-13.1 (a) Notwithstanding the provisions of § 24-13 of this Code, if the Attorney General of Virginia shall file with the Clerk of the Virginia State Senate a copy of an order of the Supreme Court of the United States, or other federal court, finally adjudicating that the terms of the incumbent members of the Senate of the General Assembly of Virginia terminate on or before the convening in January, nineteen hundred sixty-six, of the regular session of the General Assembly, the Governor shall issue a writ calling a special election to elect the several members of the State Senate. The writ shall set forth the date of the election. All other provisions of law relating to the conduct of special elections shall apply. At such special election the candidates for election to the several State Senatorial Districts, as such Districts are then legally constituted, receiving the highest number of votes, respectively, shall be declared elected, and shall, upon qualifying for office, constitute the Senate of the General Assembly. Provided, however, if the Attorney General of Virginia shall file the copy of the order hereinabove-mentioned with the Clerk of the Virginia State Senate on or before the fifteenth day of March, nineteen hundred sixty-five, the Governor, in his discretion, is authorized to issue the writ calling an election to elect the several members of the State Senate on the date of the general election in November, nineteen hundred sixty-five. In such event, except as herein modi-

fied, all other provisions of law providing for primaries or conventions to nominate persons as candidates, and for the election of members of the State Senate, shall apply. The persons so elected and qualifying shall hold office for a term of two years commencing on the second Wednesday in January succeeding their election and ending upon the convening in January, nineteen hundred sixty-eight, of the regular session of the General Assembly.

(b) Successors to the members of the State Senate elected for terms expiring in January, nineteen hundred sixty-eight, shall be elected in November, nineteen hundred sixty-seven, pursuant to the provisions of § 24-13 of the Code.

(c) This act shall expire as of January ten, nineteen hundred sixty-eight.

An Act to amend and reenact § 24-14, as amended, of the Code of Virginia, relating to State senatorial districts.

Approved December 12, 1964

Be it enacted by the General Assembly of Virginia:

1. That § 24-14, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 24-14. The State is hereby divided into **thirty-three* districts entitled to senators as follows:

First.—The counties of Accomack, Northampton, **Mathews, Gloucester and York*, one.

Second.—Norfolk city, **three.*

Third.—**The cities of Chesapeake, Portsmouth and Virginia Beach, three.*

Fourth.—The counties of Halifax, Charlotte, **Prince* Edward, *Lunenburg and Nottoway* and the city of South Boston, one.

Fifth.—The counties of Isle of Wight, Nansemond, Southampton and the cities of Suffolk and Franklin, one.

Sixth.—The counties of Greensville, *James City*, Prince George, Surry and Sussex, and the **cities* of Hopewell *and Williamsburg*, one.

Seventh.—The counties of Brunswick, *Dinwiddie and Mecklenburg, *and the city of Petersburg*, one.

Eighth.—The counties of **Arlington and Fairfax, and the cities of Fairfax and Falls Church*, one.

Ninth.—Arlington county, one.

**Tenth.*—The counties of Appomattox, Buckingham, *Amherst, Nelson and **Campbell*, one.

Eleventh.*—Bedford* County and city of Lynchburg, one.

**Twelfth.*—The counties of Henry, Patrick and Pittsylvania and the cities of Danville and Martinsville, two.

**Thirteenth.*—The counties of *Carroll, Floyd, **Franklin and Montgomery*, and the **cities* of Galax *and Radford*, one.

**Fourteenth.*—The counties of Washington, Lee and Scott and the city of Bristol, one.

**Fifteenth.*—The counties of Dickenson, *Russell* and Wise and the city of Norton, one.

**Sixteenth.*—The counties of Buchanan, **Smyth* and Tazewell, one.

**Seventeenth.*—The counties of Bland, Giles, Pulaski, *Craig, Grayson* and Wythe, one.

**Eighteenth.*—The counties of Alleghany, **Bath*, Botetourt,* and **Roanoke*, and the cities of *Clifton Forge and Covington, one.

**Nineteenth.*—The counties of Augusta, **Rockbridge* and Highland, and the cities of *Buena Vista*, Staunton and Waynesboro, one.

**Twentieth.*—The counties of Page, Rappahannock, Rockingham and Warren, and the city of Harrisonburg, one.

**Twenty-first.*—The counties of Clarke, Frederick, Shenandoah *and Loudoun* and the city of Winchester, one.

**Twenty-second.*—The counties of Albemarle, Fluvanna, Greene, *Cumberland, Powhatan* and Madison, and the city of Charlottesville, one.

**Twenty-third.*—The counties of Goochland, Louisa, Orange, *Spotsylvania, *Culpeper, Caroline, King George* and the city of Fredericksburg, one.

**Twenty-fourth.*—The county of Fairfax and the cities of Fairfax and Falls Church, two.

**Twenty-fifth.*—The counties of *Prince William, *Stafford and *Fauquier*, one.

**Twenty-sixth.*—The counties of *Hanover, King William, Essex, King and Queen, Middlesex; *Westmoreland, Northumberland, Richmond and Lancaster*, one.

**Twenty-seventh.*—City of Newport News*, one.

**Twenty-eighth.*—City of Hampton, one.

**Twenty-ninth.*—The counties of Charles City, Chesterfield, **Amelia* and New Kent and the **city* of Colonial Heights*, one.

**Thirtieth.*—Richmond city, two.

**Thirty-first.*—County of Henrico, one.

**Thirty-second.*—City of Roanoke, one.

**Thirty-third.*—City of Alexandria, one.

PROOF OF SERVICE

I, Edmund D. Campbell, one of the attorneys for Harrison Mann, Kathryn Stone, John C. Webb and John A. K. Donovan, appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 17th day of December, 1964, I served copies of the foregoing Motion to Dismiss or Affirm on the several appellants hereto and and the remaining appellees herein, by mailing copies in duly addressed envelopes, with first class postage prepaid

(a) to the following attorneys of record for appellants: Robert Y. Button, Esquire, and R. D. McIlwaine III, Esquire, Supreme Court-State Library Building, Richmond, Virginia, 23219; David J. Mays, Esquire, and Henry T. Wickham, Esquire, State-Planters Bank Building, Richmond, Virginia, 23219;

(b) to the following attorneys for remaining appellees: Henry E. Howell, Jr., Esquire, 808 Maritime Tower, Norfolk, Virginia, and Leonard B. Sachs, Esquire, Citizens Bank Building, Norfolk, Virginia.

EDMUND D. CAMPBELL,
822 Southern Building,
Washington, D.C. 20005.
Attorney for Appellees
Mann, Stone, Webb
and Donovan.

(3512-1)